No. 17-530

IN THE

Supreme Court of the United States

WISCONSIN CENTRAL LTD.; GRAND TRUNK WESTERN RAILROAD COMPANY; AND ILLINOIS CENTRAL RAILROAD COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This case presents the question whether stock is "money"—and thus whether remuneration in stock is "money remuneration" under the Railroad Retirement Tax Act (RRTA), 26 U.S.C. § 3231(e)(1).

Petitioners' opening brief demonstrated, using traditional tools of statutory construction, that the words "money remuneration" plainly exclude remuneration in stock. The ordinary meaning of "money" is a generally accepted medium of exchange. The Internal Revenue Code, as it existed in the 1930s when the RRTA was enacted, repeatedly distinguished between "stock" and "money," just as it does today. And the limited scope of the RRTA's "money remuneration" standard stands in stark contrast to the far broader tax base the same Depression-era Congress used in the Federal Insurance Contributions Act (FICA). *See* 26 U.S.C. § 3121(a) (FICA taxes "*all* remuneration for employment, including the cash value of all remuneration (including benefits) *paid in any medium other than cash.*") (emphasis added).

The government looks for ways to get around the ordinary meaning of "money." It first asks the Court to effectively delete "money" from the statute by construing "money remuneration" to mean remuneration in anything "that can be easily valued in or converted to cash." Br. 17. That interpretation would deprive the word "money" of any limiting force. Under the government's approach, land, cars, wine and baseball cards—all of which can be easily valued and sold for cash—would become "money."

The government also relies on four exemptions to Section 3231 to argue that "money remuneration" must be read broadly or these exemptions would be

surplusage. But those are just a handful of the numerous exemptions set forth in the statute, and they cannot change the meaning of the statutory definition enacted decades earlier. Moreover, the exemptions are *not* surplusage under petitioners' plain-language reading. For example, the exemption for remuneration "on account of" the exercise of qualified stock options, 26 U.S.C. § 3231(e)(12), encompasses cash payments that accompany the options' exercise—a common practice that is expressly recognized by IRS regulations, *see* 26 C.F.R. § 1.422-5(c). The same is true of the other exemptions: All encompass payments in cash or its equivalent. Whereas the government's reading would render the critical limiting term "money" surplusage, by equating "money remuneration" with "all remuneration," petitioners' reading harmonizes *all* provisions of the statute, including the exemptions the government invokes.

The government also looks to prior administrative interpretations for support. But those interpretations confirm petitioners' plain-language reading. The original IRS regulation construed the statute to encompass cash or its equivalent—*i.e.*, anything "which may be used in lieu of money" as a medium of exchange, including scrip and merchandise orders. 26 C.F.R. § 410.5 (1938). Although the government now claims that "scrip" means "stock," that reading is foreclosed by the regulation itself. Scrip is identified, along with merchandise orders, as an illustrative example of something "which can be used in lieu of money." That shows the IRS used "scrip" to refer to private currency paid to employees (a common practice during the Depression), rather than stock, which has never been "used in lieu of money."

The government's argument is, at heart, a request to amend the RRTA's "money remuneration" standard to conform to FICA's "all remuneration" standard. But the textual differences in the statutes should be respected. The railroad retirement system was meant to federalize and continue the railroads' pre-existing pension programs, which were based on salary or "pay roll," rather than on the many in-kind benefits railroad employees received. When Congress enacted Social Security, in contrast, it was writing on a blank slate.

Since the Great Depression, Congress has preserved railroad retirement as a separate and distinct retirement system that differs from Social Security in key respects: It has a narrower tax base; it imposes higher tax rates; and it provides more generous benefits for retirees. The government's policy preference—to "align" the tax bases of the two retirement systems through agency interpretation (Br. 47)—cannot override the statutory text to achieve what Congress for 80 years has refused to do.

TRANSFERS OF CORPORATE STOCK ARE NOT "MONEY REMUNERATION" UNDER THE RRTA.

A. Stock Is Not A Generally Accepted Medium Of Exchange And Thus Is Not "Money."

1. The plain meaning of "money" is a generally accepted medium of exchange. *See* Pet. Br. 21-23 (citing dictionary definitions). For that reason, stock is not money. No one buys their groceries with stock. The IRS, which requires payment of taxes in "money or its equivalent," does not accept payment of taxes in stock. *See* Rev. Ruling 76-350; 26 C.F.R. §§ 301.6311-1 & 301.6311-2.

The government argues that "money" means anything "that can be easily valued" or anything that can be "converted to cash." Br. 17. But that cannot possibly be what "money" means in the context of a federal tax statute like the RRTA. Under this definition, *everything* is money, as long as it has a value or can be sold. A car is "money" because it can be readily valued and sold for cash. So is land. So is a bottle of wine. Defining "money" to mean anything that has a value, or can be bought or sold, drains the word of meaning and deprives it of any constraining effect.

The government cites broad dictionary definitions of "money" as a person's overall wealth, or as "the representative ... of everything that can be transferred in commerce." Br. 16-17 (quoting Black's Law Dictionary 1200 (3d ed. 1933)). But "[i]n interpreting the meaning of the words in a revenue Act, [courts] look to the ordinary, everyday senses of the words," *Commissioner v. Soliman*, 506 U.S. 168, 174 (1993) (quotation marks omitted), and the government's own authorities recognize that this definition is not the word's ordinary meaning. *See* Black's Law Dictionary at 1200 ("*In its more popular sense*, 'money' means any currency, tokens, bank-notes, or other circulating medium in general use as the representative of value.") (emphasis added).

The government's proposed definition would render the limiting term "money" surplusage. No court has interpreted the RRTA this way. Both the Seventh Circuit below and the Eighth Circuit in *Union Pacific* agreed with petitioners that "money" refers to a generally accepted medium of exchange. *See* Pet. App. 4a; *Union Pac. R.R. Co. v. United States*, 865 F.3d 1045, 1049 (8th Cir. 2017). This Court has

recognized that "money . . . is a medium of exchange," *Railway Express Agency v. Virginia*, 347 U.S. 359, 365 (1954), and that treasury warrants are not "money" because they do not serve as a medium of exchange in general commerce, *Houston & Tex. Cent. R.R. Co. v. Texas*, 177 U.S. 66, 83-85 (1900); *see also Thompson v. Butler*, 95 U.S. 694, 696 (1877) (describing "money" as "a medium of exchange").

2. The government contends that, even if money means a medium of exchange, stock still is "money" because it is sometimes transferred in corporate takeovers. Br. 19. But this ignores the key words in the government's own definition—money must be "'*customarily used* as a medium of exchange.'" *Id.* (quoting *Webster's Second* at 1583) (emphasis added). A specialized use in the corporate-takeover context is not customary use in society. Moreover, even in corporate takeovers, stock is not used as a medium of exchange—rather, it is the asset that is being sold or acquired. The same is true in the context of employee compensation. When an employee is given stock in exchange for performing services, the stock is not being used as a medium of exchange, just as an employer's provision of a free lunch does not make food a medium of exchange.

The government argues that stock is money because employees of other railroads, participating in stock-option plans that differ from the plan at issue here, immediately sell their stock upon exercise and thus "experience" the option as a cash deposit. Br. 20 (quotation marks omitted). But less than half the options at issue in *this* case were exercised in that way, *see* Pet. Br. 13. Moreover, many intervening steps occur between the employer's transfer of stock and the employee's "experience" of receiving cash: the

employee must communicate with his or her broker, who must then communicate with a licensed trader, who must then locate a buyer at a specific price, consummate the sale, deduct agency fees for the transaction, and then transfer the remaining proceeds. That the employee chooses to sell his or her stock for cash does not transform stock into money. And because the cash does not come from the railroad employer, but from a third-party purchaser on the open market, it would not be "remuneration" in any event.

The government also ignores that for many years, the employee did not "experience" the stock option as cash. The employee had only a future possibility of someday acquiring stock that could potentially be sold for cash. If the stock price fell below the strike price, the option would be worthless and all the employee would "experience" would be disappointment. This is a critical difference between remuneration in cash and remuneration in stock options. The value of stock and stock options fluctuates substantially, at times dramatically. Stock is an investment property, and the strong possibility of dramatic swings in value is yet another way that stock is not, as the government claims, the "practical equivalent" of cash. Br. 20 (quotation marks omitted).

3. The original meaning of "money remuneration" is further confirmed through the 1939 Internal Revenue Code—a powerful contemporaneous indicator of what the Depression-era Congress meant when it used the word "money" in a tax statute. *See* Pet. Br. 30-31. As even the Seventh Circuit acknowledged, the Code "treats 'money' and 'stock' as different concepts." Pet. App. 4a. The government is silent in response.

The *current* tax code also repeatedly distinguishes between stock and money. *See* Pet. Br. 32-33. The government identifies a single provision where, solely for purposes of that provision, Congress expressly defined "money" to include securities. But this special definition just confirms that the *ordinary* meaning of money does not include securities. The government also cites a definition of "monetary instrument" in Title 18, but a definition of a different term from the modern criminal code casts little light on what Congress meant in the 1937 tax code.

This Court's tax cases have distinguished between "stock" and "money." *See Commissioner v. LoBue*, 351 U.S. 243, 247 (1956); *Helvering v. Credit Alliance Corp.*, 316 U.S. 107, 112 (1942). Although the government claims that in these cases the Court must have been using the word "money" in "its narrower sense," Br. 25, both cases underscore that in the context of federal tax law, just as in ordinary English, stock is not money.

At the same time the government downplays this Court's understanding of "money" in the tax context, it relies heavily on cases from state courts discussing what individual testators meant when they referred to their "money" *in their will*. Br. 22-23. All this shows is that the meaning of "money," like the meaning of any word, must be understood in context. It is hardly surprising that the word "money" may be understood by individual testators to mean different things. In fact, the cases cited by the government recognize that "[t]he word 'money' in its usual and ordinary acceptation means gold, silver, or paper money used as a circulating medium of exchange," but that sometimes the individualized intent of the testator requires departing from that ordinary

meaning and interpreting "money" more broadly, particularly in light of the presumption against partial intestacy. *Lane v. Railey*, 133 S.W.2d 74, 79 (Ky. Ct. App. 1939) (quotation marks omitted).

4. The original IRS regulation further confirms that the word "money," as used in the RRTA, excludes stock. That regulation defined "compensation" as "all remuneration in money, or in something which may be used in lieu of money (scrip and merchandise orders, for example)." 26 C.F.R. § 410.5 (1938); *see also id.* § 410.6(a) ("compensation" includes "[s]alaries, wages, commissions, fees, bonuses, and any other remuneration in money or in something which may be used in lieu of money").

The government insists that scrip means stock. Br. 37-38. But this ignores the text of the regulation, which identifies "scrip and merchandise orders" as illustrative examples of "something which may be used in lieu of money." 26 C.F.R. § 410.5 (1938). Read in context, "scrip" refers to private currency paid to employees—not to stock, which has never been "used in lieu of money." *See* Webster's New Int'l Dictionary 2249 (2d ed. 1934) (defining "scrip" as a "certificate . . . issued to circulate in lieu of government currency" and/or "by a corporation that pays wages partly in orders on a company store"); Loren Gatch, *Local Money in the United States During the Great Depression*, in 26 Essays in Econ. & Bus. Hist. 47-48 (2008) (discussing scrip as private currency); *Keokee Consol. Coke Co. v. W.W. Taylor*, 234 U.S. 224, 226 (1914) (company gave its employees "scrip . . . as an advance of monthly wages in payment for labor performed" that was redeemable in merchandise at the company store).

The meaning of "scrip" is further confirmed by 26 C.F.R. § 410.6(a) (1938), which provides additional examples of remuneration that "may be used in lieu of money," and does not mention stock. The Labor Department expressed the same understanding when it prohibited employers from paying employees in scrip. *See* 13 Fed. Reg. 419, 421 (Jan. 30, 1948) ("Scrip, tokens, credit cards, 'dope checks,' coupons, and similar devices are not proper mediums of payment under" the Fair Labor Standards Act.).

The government's reliance on Railroad Retirement Board interpretations is misplaced. Br. 38-41. The Board is not the agency statutorily authorized to administer the RRTA, so its views are not entitled to deference. More fundamentally, the Board's regulations support *petitioners* because they provide that non-money remuneration may be treated as "compensation" for Railroad Retirement Act benefits purposes *only if* the employer and employee have agreed in advance to do so—and *only if* they have reached an agreement as to the value of the "commodity, service, or privilege" prior to the employee's performance of services. *See* 20 C.F.R. § 222.2 (1938); 20 C.F.R. § 211.2 (current). Even though such an agreement requires overpayment of RRTA taxes, employees sometimes do so to increase their benefits upon retirement.

These regulations confirm petitioners' interpretation, because they reflect that the statute does *not* encompass non-money remuneration. If it did, there would be no need to obtain consent; the items would be taxed automatically. The Board itself has conceded that the reason it needs consent is because these items are *excluded* by the words "money remuneration." In Board Opinion L-1986-82, which

the government carefully avoids citing, the Board explained that, unlike FICA, the RRTA does not "provide that compensation includes remuneration paid in any medium." *Id.* at 6 (quotation marks omitted). Thus, "absent a change in the definition of compensation in the RRTA," non-money remuneration "would not be included in compensation under the RRTA unless the employer and employee first agree to [its] dollar value . . . and then agree that this dollar value shall be part of the employee's compensation package." *Id.*[1]

In fact, if the Board's regulations and opinions controlled this case, petitioners would win because they never consented to treat stock as compensation. Nor did they agree on a value before the employees performed the services. That would have been impossible, because the options could not be exercised for many years and the future value of the stock could not have been known at the time the options were granted.

Finally, the government overreaches in claiming that, in light of these administrative interpretations, Congress has acquiesced in the view that stock is money and hence taxable. Br. 42. The bar for acquiescence is very high and not met here. *See Rapanos v. United States*, 547 U.S. 715, 751 (2006). That is especially true because, as explained above,

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[1] The Board's 1938 opinion supports petitioners for the same reason: It holds that stock may be treated as "compensation" only if the employer and employee have agreed to do so, and agreed on a valuation. Opinion L-1938-440, at 2. And the Board's 2005 opinion does nothing more than rely on the current IRS regulation. L-2005-25, at 5-7.

the administrative opinions actually support *petitioners'* interpretation.[2]

B. The Exemptions Do Not Change The Plain Meaning Of "Money Remuneration" And Are Not Surplusage.

The government argues that various exemptions in Section 3231 perform a work of alchemy by transforming stock into "money." The government identifies four exemptions that it claims would be superfluous under petitioners' plain-language reading. Br. 26-34. But any inference the government seeks to draw from the exemptions cannot change the original meaning of "money remuneration." The canon against surplusage is merely an interpretive aid where the text is ambiguous, which is not the case here. Moreover, all the exemptions encompass payments in cash or cash equivalents, and thus are not surplusage under petitioners' reading, as the Eighth Circuit recognized. *See Union Pacific*, 865 F.3d at 1050-51; *see also* Amicus Br. of CSX Corp., *et al.* at 4-15.

1. As originally enacted, Section 3231 was short and simple. It defined "compensation" to mean "money remuneration" and had only two exemptions: one for tips, the other for the employer's payment of the employee's share of the RRTA tax. *See* 50 Stat. 435, 436 (1937). Those remained the only exemptions from 1937 until 1976, and both reinforce the original

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[2] The government wrongly implies (Br. 7) that the railroads' paying RRTA taxes on stock reflects an acknowledgment that stock was taxable. In fact, it is a responsible corporate decision to pay the tax and seek refunds, rather than refuse to pay and force the IRS to commence proceedings. Every refund action proceeds this way.

meaning of "money remuneration" as remuneration in cash or cash equivalents, because they both involve cash or cash-equivalent payments.

In recent years, Congress has enacted many exemptions further restricting the RRTA's tax base. Some of those exemptions are set forth in subsections of Section 3231(e) itself. *E.g.*, (e)(1)-(e)(12). Others are found in other sections of the tax code and incorporated through cross-reference. *E.g.*, (e)(5) (cross-referencing 26 U.S.C. §§ 74(c), 108(f)(4), 117, 132). And even the cross-referenced provisions cross-reference *other* provisions. *E.g.*, 26 U.S.C. § 108(f)(4) (cross-referencing provisions of the Public Health Service Act).

The government does not dispute that virtually all of these exemptions apply to payments in cash or cash equivalents—and thus are fully consistent with the plain meaning of "money remuneration." Instead, the government seizes on four specific exemptions to argue by inference that "money remuneration" must mean "all remuneration" or else those exemptions would be superfluous. But this is no way to construe a tax statute. As the RRTA illustrates, Congress typically writes a tax statute by establishing a tax base, followed by a list of exemptions that expand over time. *See, e.g.*, 26 U.S.C. § 61 (defining "gross income); *id.* §§ 101-140 (exemptions to "gross income"). The purpose of the exemptions is to *limit* the tax base. Here, however, the government uses a handful of exemptions as a way of *expanding* the tax base well beyond its plain meaning. Any tax statute could be distorted through this method of interpretation, as tax statutes often have dozens of exemptions, some of which, like the qualified stock option exemption discussed below, may have been drafted with a

different tax statute in mind and then peppered throughout the tax code in an abundance of caution to ensure uniformity of tax treatment. Even if this interpretive approach made sense in a different context, it makes little sense here. Drawing inferences from a handful of cherry-picked exemptions to distort the plain meaning of the tax base itself allows a very small tail to wag a very big dog.

2. The government's inference-by-exemption argument is particularly ill-suited to *this* case, where the four exemptions in question were enacted decades after the statutory language at issue. This Court gives words in a statute their "ordinary meaning . . . as understood when the [statute] was enacted." *Carcieri v. Salazar*, 555 U.S. 379, 388 (2009).

The government cites cases to support the proposition that "later-enacted statutory language can clarify the meaning of pre-existing provisions," Br. 28, but those cases arose in very different contexts. In *United States v. Quality Stores*, 134 S. Ct. 1395, 1400 (2014), for example, the statutory text in question was ambiguous, so the Court looked to an exemption for guidance. Here, in contrast, the government is trying to use the exemptions to *override* the plain meaning of "money remuneration" as unambiguously excluding stock. *See also W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 100 (1991) (considering later-enacted amendments to construe "ambiguous" statutory term). Other cases involve "repeal by implication of a legal disposition implied by a statutory text" (*United States v. Fausto*, 484 U.S. 439, 453 (1988)), and the difficulty in reconciling two seemingly conflicting statutes (*United States v. Estate of Romani*, 523 U.S. 517, 530 (1998)).

A far more relevant case is *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), where the Court declined to do what the government requests here: interpret a statutory provision in light of later-enacted subsections to the statute. The Court held that the "later enacted" subsections are "beside the point" because "[t]hey do not declare the meaning of earlier law" and "do not reflect any direct focus by Congress upon the meaning of the earlier enacted provisions." *Id.* at 237. The same reasoning applies here. None of the exemptions the government cites purports to alter the basic definition of "compensation"—and none reflects *any* focus by Congress, let alone a "direct" focus, on the meaning of "money remuneration."

3. The government's argument is further negated because each of the exemptions encompasses payments in cash or its equivalent. Thus, they are *not* surplusage when "money remuneration" is given its plain meaning.

Subsection 3231(e)(12) exempts remuneration "on account of" the exercise of qualified stock options. The government argues that because this subsection exempts some stock options, "money remuneration" must necessarily include stock options. But as the government concedes, cash payments sometimes accompany the exercise of qualified stock options. *See* Br. 29; *Union Pacific*, 865 F.3d at 1050 (noting government concession "that money is sometimes received when a qualified stock option is exercised"). That happens when employers transfer cash to the employee along with the stock, *see* 26 C.F.R. § 1.422-5(c), or when the employer transfers cash in lieu of a fractional share. *See Union Pacific*, 865 F.3d at 1050.

The government's only response is to claim that the exemption is not "naturally read" to exclude the cash payments that accompany the exercise of stock options. Br. 29. But the provision is not limited to the stock itself. It exempts *any* remuneration "on account of" the exercise of qualified stock options, 26 U.S.C. § 3231(e)(12)—language that plainly encompasses the cash payments that are triggered by the employee's exercise of the options and the transfer of the shares. Although the government contends that, under petitioners' interpretation, the exemption would "reach only small cash payments," Br. 30, "it is [the Court's] function to give the statute the effect its language suggests, however modest that may be." *Digital Realty Trust v. Somers*, 138 S. Ct. 767, 780 (2018) (quotation marks and alteration omitted).

The government claims that the exemption's history and purpose support an inference that stock would otherwise be taxable under the RRTA. Br. 31. But it is mistaken. The exemption applies to qualified stock options (QSOs). In the early 2000s, the IRS considered the tax treatment of QSOs. The IRS took the position that, if an employee sold his or her stock before holding it for a specified time (a "disqualifying disposition"), the spread at exercise and some additional appreciation should be taxable as "wages" under FICA. *See* IRS Notice 2001-14 (Feb. 5, 2001); 66 Fed. Reg. 57,023 (Nov. 14, 2001) (proposed regulations). Congress disagreed, so it amended FICA to exempt these transfers of stock and cash, and then inserted the same exemption into every federal employment-tax statute, including the RRTA.

This approach was consistent with Congress's customary practice of inserting identical exemptions into multiple federal tax statutes at the same time to

ensure uniformity of result, even at the cost of occasional redundancy or surplusage. Here, the report from the Joint Committee on Taxation shows the exemption's inclusion in the RRTA was an afterthought. The report presents the exemption as an exemption to FICA—and then mentions *in a footnote*, without any discussion, that the same exemption would be placed in the RRTA. *See General Explanation of Tax Legislation Enacted in the 108th Congress* at 219 n.378.

It would be extraordinary to conclude that in 2004, after nearly 70 straight years of "money remuneration" being limited to cash or cash equivalents, Congress, through a small, rifle-shot amendment aimed at addressing a discrete problem that had arisen under a different statute, ended up making a profound change in the RRTA's tax base, by changing "money remuneration" to "all remuneration." *See Almendarez-Torres*, 523 U.S. at 237 (later-enacted amendments do not cast light on original meaning absent "direct focus" by Congress); *Warner v. Goltra*, 293 U.S. 155, 159 (1934) (later-enacted exclusion does not change original meaning of statutory term).

Subsection 3231(e)(5) cross-references four Code provisions and excludes numerous items from taxation. The government does not dispute that the vast majority of subsection (e)(5)'s coverage is not surplusage under petitioners' reading. Instead, it zeroes in on employee achievement awards, revealing just how far it must stretch in an effort to establish surplusage. Many employers give their employees cash equivalents in the form of gift cards that can be used in lieu of cash (Amazon gift cards, for example). The government disagrees with the Eighth Circuit,

see Union Pacific, 865 F.3d at 1051, that these cash equivalents are not covered by the exemption. It reasons that subsection (e)(5) cross-references Section 74(c), which cross-references Section 274(j), which looks to subsection 274(j)(3)(A)(ii), which addresses gift cards. But that final subsection—on which the government's argument ultimately rests—was enacted in 2017, long after the tax years at issue in this case. The suggestion that this amendment (to a provision two cross-references removed from the RRTA itself) sheds light on the meaning of "money remuneration" is a bridge too far.

Subsection 3231(e)(9) exempts, among other things, cash payments related to meals. *See* 26 U.S.C. § 119. The government does not dispute that this exemption has meaning under petitioners' reading of "money remuneration," in that it exempts the cash payments employers make to their employees if the employees are required to pay back that money in exchange for meals. *See* Br. 33. Although the government comments that it would be "strange" for Congress to have worded the exemption broadly if it simply intended to target these payments, *id.*, Congress often frames exemptions broadly to avoid doubt—and to guard against situations where amendments to cross-referenced provisions could have a ripple effect.

Subsection 3231(e)(1)(i) exempts "any payment" made to, or on behalf of, employees on account of sickness or accident. The government admits that this subsection is not surplusage under petitioners' reading, as a "payment" to employees plainly is "money remuneration." And if the government is right that the language concerning payments made "on behalf of" the employee has limited "practical

effect" under petitioners' reading, Br. 34, the same is true on the government's reading: The significance of this language turns on what constitutes "remuneration," not "money."

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Even if the government were correct that a handful of the exemptions do limited work under petitioners' interpretation, the government's interpretation does far greater damage to the statute by rendering "money"—the critical limiting term in the tax base itself—superfluous. "[A]s between one interpretation that would render statutory text superfluous and another that would render it meaningful yet limited, we think the latter more faithful to the statute Congress wrote." *Clark v. Rameker*, 134 S. Ct. 2242, 2249 (2014).

C. Giving "Money Remuneration" Its Plain Meaning Respects The Textual Differences With FICA, And Is Consistent With The RRTA's History And Purpose.

1. Whereas the RRTA taxes "compensation," which it defines as "money remuneration," 26 U.S.C. § 3231(e)(1), FICA taxes "wages," which it defines as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." 26 U.S.C. § 3121(a). In the RRTA, Congress intended to tax only a subset of all the remuneration railroad employees received—and it omitted the critical language it included in FICA extending the tax base to encompass remuneration "paid in any medium other than cash."

This Court ordinarily "presume[s] differences in language like this convey differences in meaning." *Henson v. Santander Consumer USA*, 137 S. Ct. 1718,

1723 (2017). But after spending 48 pages urging the Court to appreciate the similarities between the RRTA and FICA, at the end of its brief the government switches gears and argues that the Court should *disregard* the critical textual differences in the tax bases because the RRTA and FICA are not "the same statute or statutes that were derived from one another." Br. 49; *id.* at 50 (suggesting that "money remuneration" and "all remuneration" be treated as "synonyms").

The government cannot have it both ways. The same Depression-era Congress enacted, almost simultaneously, two retirement schemes with a number of similarities—but with strikingly different tax bases. The language Congress chose should be given meaning and the textual differences should be respected, particularly when those textual differences appear in the very *definitions* of the key statutory terms.

2. The government does not seriously dispute that the RRTA's historical context shows that Congress sought to mirror the pre-existing salary-based pension system that was standard throughout the railroad industry. *See* Railroad Retirement Board Handbook at 1 (explaining that the RRTA's purpose was to "continue and broaden *the existing* railroad programs") (emphasis added). Although the government questions why Congress would use a struggling pension system as a model, Congress addressed concerns about underfunding by setting appropriate tax rates and benefit levels, while keeping the industry's historic salary-based structure in place.

The government's discussion of legislative history relies on unenacted bills that were rejected in favor of

what became an invalidated version of the railroad benefits statute. Br. 35-36. The government also notes that the RRTA's predecessor provided that "compensation" does not include "free transportation." *Id.* at 36. But free transportation was often provided in the form of cash reimbursements—that is, money "issued to persons entitled to free transportation." 1 Fed. Reg. 1,576, 1,577 (Oct. 13, 1936). Moreover, Congress deleted the reference to "free transportation" when it enacted the RRTA, suggesting that Congress deemed it unnecessary because it was already excluded by the phrase "money remuneration."

The government concedes another powerful and telling indicator of the meaning of "money remuneration": Congress projected the tax revenues the RRTA would generate based solely on the "pay roll" of railroad employers. *See* Pet. Br. 26. The government speculates that Congress may have viewed the pay roll data as a mere "starting point." Br. 44. But the fact that Congress, at the very moment it enacted the RRTA, determined the future tax revenue based solely on compensation in cash or its equivalent—and *not* on stock or other non-money benefits—confirms that Congress used the word "money" in its ordinary, everyday sense.

3. The government strives to create the false impression that Social Security/FICA and the railroad retirement system provide "identical" benefits and "largely parallel[ ]" one another. Br. 2. But the article the government repeatedly cites as authoritative (Br. 3, 42, 44) emphasizes the many "key differences" between the two statutes in both "funding and benefit structure." Kevin Whitman, *An Overview of the*

Railroad Retirement Program, 68 Soc. Sec. Bull. No. 2, at 41 (2008).

One obvious difference is that Social Security has nothing resembling the Railroad Retirement Act's Tier 2, which is akin to a private pension program based on earnings and career service. *See* 45 U.S.C. § 231b(b). As a result, the railroad retirement system provides more generous benefits than Social Security. Of course, it also imposes significantly higher tax rates. *See* Pet. Br. 45-46. The government attempts to mask these differences by ignoring the railroad retirement system's Tier 2, and arguing that *Tier 1* is analogous to Social Security. But there are differences here as well. For example, Tier 1 allows railroad employees to retire at age 60 with 30 years of service, which Social Security does not. *See* 45 U.S.C. § 231a(a)(1)(ii).

If Congress had wanted railroad employees to get Social Security benefits and be subject to FICA taxation as most other industries are, it would not have created the two tiers in the 1970s. Instead, it would simply have deleted 26 U.S.C. § 3121(b)(9)—the provision that exempts railroads from FICA—and left the railroad retirement program as just the Tier 2 pension system.

4. The government contends that adopting its interpretation will preserve the solvency of the railroad retirement program. But there is no threat to solvency: It is undisputed that the amount of tax in dispute is less than 2 percent of the overall RRTA tax petitioners paid. Pet. Br. 14. Moreover, the RRTA's Tier 2 tax rates *automatically adjust* to ensure solvency. *See* 26 U.S.C. § 3241.

The government also warns against allowing employers to structure compensation as a way to

avoid taxes. Br. 43. But issuing stock options to employees is not some nefarious tax dodge. To the contrary, stock options are widely recognized and encouraged as a positive way to align the incentives of employers and employees.[3]

D. The IRS Regulation Does Not Support The Government And Does Not Deserve Deference.

The current IRS regulation does not say that stock is taxable under the RRTA. It does not even mention stock. Rather, it generally provides that RRTA "compensation" shall be given the same meaning as FICA "wages"—"except as specifically limited by the [RRTA]." 26 C.F.R. § 31.3231(e)-1. The restriction of the RRTA's tax base to "money remuneration," especially when compared to FICA's "all remuneration," plainly constitutes an RRTA-specific limitation.

If, as the government insists, the limitation to "money" remuneration is not a "railroad-specific limitation," that would mean the RRTA's tax base (money remuneration) and FICA's tax base (all remuneration) are the same—an outcome that indisputably would delete the word "money" from the RRTA. That interpretation would give RRTA "compensation" and FICA "wages" "the same meaning," 26 C.F.R. § 31.3231(e)-1, even though Congress defined them *differently*. Thus, if the

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[3] The government's argument (Br. 19-20) that senior railroad executives receive substantial awards of stock is beside the point. With limited exceptions, the RRTA taxes remuneration up to a specified cap. *See* 26 U.S.C. § 3231(e)(2). That cap is exceeded by the executives' cash salary, so the fact they receive stock has very limited effect on their RRTA tax liability.

regulation means what the government says it means, it fails *Chevron* step one because it conflicts with the statute.

The government argues that the regulation's reference to RRTA-specific limitations refers to limitations set forth in the exemptions to the RRTA's tax base, but not to limitations contained in the tax base itself. This is an unnatural "interpretive gerrymander[ ]" that is not supported by the language of the statute or the regulation itself. *Michigan v. EPA*, 135 S. Ct. 2699, 2708 (2015).

The regulation also fails *Chevron* step two because it is not a permissible interpretation. The government's argument that 26 U.S.C. § 3121(b)(9) is intended to prevent double taxation is only partly true. Its other purpose is to maintain railroad retirement as a separate and distinct system from FICA—a congressional judgment the government, through aggressive statutory "interpretation," should not be allowed to override.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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